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**MAR 08 2005**

**OFFICE OF PETITIONS**

**ON PETITION**

In re Application of  
Clay Davidson et al.  
Application No. 09/746,671  
Filed: December 22, 2000  
Attorney Docket Number: EWG-097US

This is a decision on the petition under 37 CFR 1.137(a),<sup>1</sup> to revive the above-identified application, filed February 7, 2005.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)" or "Renewed Petition under 37 CFR 1.137(b)." This is not a final agency decision.

This application became abandoned on October 16, 2004 for failure to timely respond to the non-Final Office Action mailed July 15, 2004. The instant petition and this decision on petition precedes the mailing of the Notice of Abandonment.

Petitioner asserts unavoidable delay in responding to the office action based on non receipt of the office action. Petitioner asserts that a revocation and power of attorney were filed sometime after May 28, 2003 but that the office action was mailed to the prior counsel. Petitioner further argues non-receipt with a statement from the prior counsel, averring that after a check of his records, he also did not receive the office action.

The Commissioner may revive an abandoned application if the delay in responding to

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<sup>1</sup> A grantable petition under 37 CFR 1.137(a) must be accompanied by:

- (1) the required reply, unless previously filed; In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.
- (2) the petition fee as set forth in 37 CFR 1.17(l);
- (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and
- (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to be "unavoidable".<sup>2</sup> Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.<sup>3</sup>

The showing of record is inadequate to establish unavoidable delay within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a).<sup>4</sup> Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, facsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office.<sup>5</sup>

A review of the file does not reveal that a revocation and power of attorney was filed in the instant matter. The copy of the revocation and power of attorney alleged to have been filed sometime after May 28, 2003 does not comply with 37 CFR 1.8, there is no certificate of mailing submitted as proof. Additionally, the copy of the revocation and power of attorney submitted with the petition is for an application other than the instant application. Please note the application serial number of the copy forwarded with the

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<sup>2</sup>35 U.S.C. § 133.

<sup>3</sup>In *re Mattullath*, 38 App. D.C. 497, 514-15 (1912)(quoting *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also *Winkler v. Ladd*, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), *aff'd*, 143 USPQ 172 (D.C. Cir. 1963); *Ex parte Henrich*, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." *Smith v. Mossinghoff*, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." *Haines v. Quigg*, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

<sup>4</sup>See MPEP 711(c)(III)(C)(2) for a discussion of the requirements for a showing of unavoidable delay.

<sup>5</sup>*Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

petition. Neither the serial number, inventor, filing date or title of the invention match that for application no. 09/746,671.

In view thereof, the non-Final Office Action was mailed to the address and attorney of record. Even in view of the statement of Mr. Galbi, no corroborating evidence has been submitted to support his claim that he never received the office action mailed to his address. The application is abandoned because of an error on the part of the applicants, not that of the USPTO, and thus cannot be viewed as unavoidable delay.

As petitioner has presented no showing of unavoidable delay, the petition will be dismissed.

### ALTERNATIVE VENUE

Petitioner may wish to consider filing a renewed petition under 37 CFR 1.137(b)<sup>6</sup>, which now provides that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b).

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Additionally, since there is no evidence that petitioner herein was ever empowered to prosecute the instant application, if petitioner desires to receive future correspondence regarding this application, the appropriate power of attorney documentation must be submitted. A courtesy copy of this decision will be mailed to petitioner. However, all

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<sup>6</sup>Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). a grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

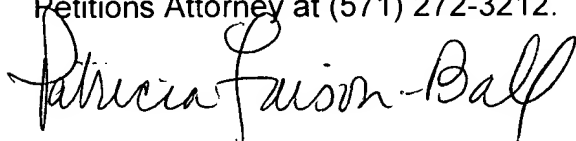
future correspondence will be directed to the address of record until such time as appropriate instructions are received to the contrary.

Further correspondence with respect to this matter should be addressed as follows:

By mail:      Mail Stop Petitions  
                 Commissioner for Patents  
                 P.O. Box 1450  
                 Alexandria VA 22313-1450

By FAX:      (703)308-6916  
                 Attn: Office of Petitions

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.

A handwritten signature in cursive script, reading "Patricia Faison-Ball".

Patricia Faison-Ball  
Senior Petitions Attorney  
Office of Petitions

cc:

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